

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PROGRESSIVE AMBULANCE, INC., et al.,

Plaintiffs, Cross-defendants and
Appellants,

v.

GEA MANAGEMENT/LIBERTY, INC., et al.,

Defendants, Cross-complainants
and Appellants.

F039731

(Super. Ct. Nos. 239496-SPC and
240374-SPC)

O P I N I O N

APPEALS from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Law Offices of Richard A. Monje and Richard A. Monje; and Peter P. Mosesian for Defendants and Appellants.

Clifford & Brown and John R. Szewczyk for Plaintiffs and Respondents.

This appeal concerns the involuntary termination of two agreements entered into between appellant and cross-respondent GEA Management/Liberty, Inc. (GEA/Liberty) and respondent and cross-appellant Progressive Ambulance, Inc. (Progressive). Under a

management agreement, Progressive retained GEA/Liberty to operate Liberty Emergency Medical Services and Lifeline Special Event Services (Liberty), a company owned by Progressive. In the contemporaneous option agreement, Progressive granted GEA/Liberty the exclusive right to purchase Liberty in exchange for a monthly option payment.

Approximately two and one-half years after this relationship was formed, Progressive and its owners, A.R. Sandy Poulin and Cheryl Poulin, filed a complaint alleging that GEA/Liberty had breached the management agreement and therefore both agreements had terminated. The jury agreed and returned a verdict in favor of Progressive and the Poulins on this issue. However, only nominal damages were awarded. The jury also denied GEA/Liberty recovery on its cross-complaint for breach of contract and money due.

On appeal, GEA/Liberty argues it is entitled to judgment on its breach of contract claim because Progressive did not give GEA/Liberty 15 days' written notice of default before filing suit. GEA/Liberty further contends the trial court erroneously failed to independently rule on GEA/Liberty's equitable claims. Additionally, GEA/Liberty asserts that the evidence does not support the jury's findings of material breach of contract and breach of fiduciary duty. In their cross-appeal, Progressive and the Poulins argue that GEA/Liberty's chief financial officer should have been held liable for breach of fiduciary duty and that it should have been permitted to amend the judgment to add GEA/Liberty's parent corporations as defendants on an alter ego theory.

As discussed below, substantial evidence supports the jury's verdict. Moreover, the trial court did not err with respect to the rulings in dispute. Therefore, the judgment will be affirmed.

STATEMENT OF THE CASE AND FACTS

Sandy and Cheryl Poulin are the sole shareholders, officers and directors of the Poulin Corporation. Liberty Emergency Medical Services, also referred to by the parties as Liberty Ambulance, was one of that corporation's business ventures. Liberty had been granted the exclusive right to respond to all emergency calls for medical and ambulance service in a portion of eastern Kern County, designated area 7, pursuant to an operating permit issued by the county. Such a permit is the primary asset of any ambulance service. Lifeline Special Event Services, a related Liberty business, provided stand-by ambulance services at various events.

The Poulins had owned and operated ambulance services since 1972. At one point during their careers, the Poulins sold an ambulance company, carried back a note for the purchase price, and transferred the exclusive operating permit to the buyer. However, the buyer defaulted and the permit was lost. The permit was eventually awarded to one of the Poulins' competitors, Hall Ambulance. The Poulins estimated that they lost approximately \$1 million on that transaction.

Golden Empire Ambulance (Golden Empire) held the medical emergency operating permit for one of the other Kern County areas. Peter Mosesian owned this ambulance service through a series of entities. Peter Mosesian was the sole trustor and beneficiary of the Mosesian Family Trust. This trust owned the Mosesian Family Corporation. The Mosesian Family Corporation owned GEA Holding Corporation (GEA Holding) and GEA Holding owned Golden Empire. In 1995 Peter Mosesian hired John Penrose as Golden Empire's chairman of the board and, in 1996, Penrose became president of that company.

During late 1995 and 1996, Sandy Poulin and John Penrose engaged in a series of discussions regarding the sale of Liberty to Golden Empire. While Poulin was receptive to Golden Empire's overtures, he made it clear that, based on his past experience with such a sale, he would not transfer the operating permit until he was paid in full. In

response, Penrose explained that Golden Empire was not in a position to “do an all-cash deal.” Discussions nevertheless continued regarding alternative structures for the transaction.

Eventually, the parties agreed to enter into a management and option arrangement. The intent was to permit Golden Empire to operate Liberty as if it were the owner while Poulin retained the operating permit. However, Golden Empire would be given the option to purchase Liberty’s assets. Although the assets would not be transferred until full payment of the agreed-upon price, the monthly option payments would be credited against the purchase obligation. During the negotiations, Penrose assured Poulin that there were persons in place at Golden Empire who could fulfill the management needs and requirements for Liberty. Of critical interest to Poulin was that his company be properly managed and that he be protected if Golden Empire failed to meet its obligations.

To facilitate this transaction, two new corporations were formed. Progressive Ambulance came into being to separate Liberty from Poulin Corporation’s other assets. Golden Empire formed GEA Management/Liberty as a wholly owned subsidiary for the purpose of entering into the agreements with Progressive.

Under the management agreement, Progressive retained GEA/Liberty as “the exclusive agent and representative of Progressive Ambulance, Inc. for the management and operation of LIBERTY pursuant to the permits, service contracts, licenses and other authorizations.” Although subject to limitations stated elsewhere in the agreement and the discharge of its fiduciary duties, GEA/Liberty was vested with, and had all the rights, powers and privileges of an owner, including the right to receive all net income from the operation of Progressive. However, the agreement required GEA/Liberty to perform certain tasks including to actively market a subscription ambulance service in Liberty’s service area, to provide the Poulins with financial statements each month, to adopt an annual budget, and to pay Progressive’s bills in a timely fashion. Moreover,

GEA/Liberty was prohibited from carrying an aggregate of loan balances and lease obligations in excess of \$150,000. The term of this management agreement was 15 years unless earlier terminated by cancellation of the option agreement or GEA/Liberty's default.

The option agreement granted GEA/Liberty the right to purchase, without the obligation to purchase, Progressive's stock from the Poulins for \$3,200,000. To keep this option, GEA/Liberty had to pay the Poulins \$22,500 per month. These option payments would be credited against the purchase price if the option were exercised. However, if the agreement otherwise terminated, the Poulins were entitled to retain these option payments. If the management agreement terminated, this option agreement terminated as well.

Sandy Poulin and GEA/Liberty also entered into a consulting agreement. Under this agreement Poulin was to receive 15 percent of Progressive's annual collections between \$1,200,000 and \$3,400,000 in exchange for Poulin's being available as necessary to consult with GEA/Liberty regarding budgets, maintenance schedules and regulatory issues relating to Progressive's management and operation.

Although these agreements were executed in March 1997, they were effective beginning February 1, 1997. At that time, Penrose was the president and a director of each involved corporate entity, i.e., GEA Holding, Golden Empire, GEA/Liberty, and Progressive. Robert Mosesian was the chief financial officer and a director of each of these entities.

When GEA/Liberty took over the management of Progressive, it arranged for Progressive to borrow up to \$150,000 from Golden Empire. Progressive's assets secured this line of credit. Progressive also leased a number of ambulances and medivans from Golden Empire as needed on a month-to-month basis.

By early 1999, the Poulins had become concerned regarding GEA/Liberty's management of Progressive. They had not received the financial reports for December

1998 and January and February 1999. The Poulins also questioned whether Progressive's debts were being timely paid.

In April 1999, Peter Mosesian signed an agreement with Hall Ambulance giving Hall the option to purchase Golden Empire's operating permit. When Hall Ambulance exercised this option in June, Penrose advised Sandy Poulin. Poulin was very upset about this sale.

In conjunction with the sale to Hall Ambulance, Golden Empire obtained a new line of credit from Nevada Business Credit (NBC). To secure this obligation, Golden Empire pledged all of its remaining assets, including the ambulances that it had leased to Progressive. NBC was solely owned and operated by Peter Mosesian.

On June 24, 1999, Penrose met with Sandy Poulin to discuss issues that concerned Poulin, including the sale of Golden Empire to Hall Ambulance. At the start of the meeting, Poulin specifically asked Penrose to take notes and Penrose complied.

During this meeting Poulin first asked Penrose to write down "mistrust because of sale" and "faith." Poulin explained that because Penrose had not given him information about the Hall sale Poulin no longer trusted Penrose and felt that Penrose was not acting in good faith. Poulin was also concerned that the sale would limit GEA/Liberty's ability to manage Progressive because of infrastructure changes and loss of personnel. Poulin also believed that the sale of Golden Empire to Hall Ambulance would permit Hall to compete with Liberty.

Poulin additionally raised concerns aside from the sale. Poulin complained that shareholder meetings had not been held and that the budgets for 1998 and 1999 had not been approved as required by the management agreement. Poulin also questioned whether the ambulance membership program was being actively marketed, whether Progressive's assets were being commingled, and whether GEA/Liberty had taken Medicare assignments in violation of the management agreement.

On August 7, 1999, the Poulins held a shareholder meeting. They elected themselves as the sole directors of Progressive and removed the other directors, including Penrose. Thereafter, they removed the current corporate officers and elected themselves to fill those positions.

On August 11, the Poulins filed the underlying complaint against GEA/Liberty, Golden Empire, GEA Holding and Hall Ambulance for injunctive relief and damages. The Poulins obtained a temporary restraining order on August 12 and retook control of Progressive's business operations.

GEA/Liberty, GEA Holding, and Golden Empire filed a cross-complaint against Progressive and the Poulins. GEA/Liberty sought damages for breach of contract and specific performance. GEA/Liberty further requested a declaration that Progressive and the Poulins could not terminate the management and option agreements without providing 15 days' written notice and an opportunity to cure any alleged default. Golden Empire sought repayment of the \$150,000 it loaned to Progressive, lease payments due for the use of its ambulances, and money due for supplies it provided to Progressive.

A jury returned a special verdict in favor of Progressive and the Poulins on certain of their causes of action. The jury found that GEA/Liberty breached the agreements and therefore Progressive and the Poulins had the right to terminate the agreements. However, no damages were awarded. Further, the jury determined that GEA/Liberty and John Penrose had breached their fiduciary duty to Progressive. Nevertheless, the jury awarded only nominal damages. The jury rejected all of the claims made by GEA/Liberty and Golden Empire in the cross-complaint.

Thereafter, the trial court held a hearing on the equitable claims raised by both sides. The court concluded that Progressive and the Poulins were entitled to a declaration that the agreements had been terminated and, consequently, the Poulins were entitled to a return of all of Progressive's assets. Further, the court held that Progressive and the Poulins were entitled to a permanent injunction prohibiting GEA/Liberty, GEA Holding,

and Golden Empire from interfering with Progressive's business operations. However, the court denied Progressive's request for an accounting and rejected its claim that Golden Empire and GEA Holding were the alter egos of GEA/Liberty. With respect to the cross-complaint, the court ruled that, based on the jury's verdict, there was no basis to grant specific performance, order an accounting, or award money in favor of GEA/Liberty.

DISCUSSION

THE APPEAL

1. *GEA/Liberty received sufficient notice of the alleged breaches of the management and option agreements.*

The management and option agreements both include the following provision:

“No action shall be brought by any party without giving the other parties fifteen (15) days written notice, specifying the default and giving that party the opportunity to correct the alleged default.”

In its cross-complaint, GEA/Liberty alleged that the Poulins breached these agreements when they failed to give such written notice before filing the underlying action.

However, the jury disagreed.

On appeal, GEA/Liberty argues that, contrary to the verdict, it is entitled to judgment on its claim for breach of the management and option agreements. In support of this position, GEA/Liberty relies on Sandy Poulin's testimony that he did not give *written* notice to GEA/Liberty of the alleged defaults in the management agreement before filing suit. According to GEA/Liberty, this admission mandates that judgment for breach of contract be entered in its favor.

It has long been established in California that substantial compliance with a contract term will meet that obligation. (*Bavin & Burch Co. v. Bard* (1927) 81 Cal.App. 722, 729; *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 377.) What constitutes substantial compliance is a question of fact that must be determined in each individual

case. (*Bavin & Burch Co. v. Bard*, *supra*, 81 Cal.App. at p. 729; *Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 672.)

As discussed above, Sandy Poulin and Penrose met on June 24, 1999, to discuss what Poulin perceived to be problems with GEA/Liberty's management of Progressive. Poulin explained his concerns to Penrose and, at Poulin's request, Penrose took written notes. Poulin's complaints included acts and omissions that constituted defaults under the management agreement. For example, Poulin objected to the failure to hold shareholder meetings, the failure to approve budgets for 1998 and 1999, the assignment of Medicare claims, the failure to actively market the ambulance subscription program, and the failure to keep Progressive's assets separate.

Thus, Penrose had notice of the alleged defaults and, through his own notes, this notice was reduced to writing. Moreover, as president of GEA/Liberty, Penrose's knowledge of Poulin's complaints was imputed to that corporation. (*Sanders v. Magill* (1937) 9 Cal.2d 145, 153.) Poulin requested that Penrose take steps to remedy these problems. However, no such actions were taken.

As a prerequisite to finding that the Poulins had not breached the management and option agreements, the jury had to find that the Poulins substantially complied with the 15-day notice requirement. The facts outlined above support this determination. Although Poulin did not provide formal written notice of the alleged defaults to GEA/Liberty, he did give oral notice to GEA/Liberty through Penrose. Further, written notes evidencing this notice were prepared. Moreover, well over 15 days elapsed between the June 24 meeting where this notice was given and the filing of the action on August 11. Thus, the purposes of requiring 15 days' written notice were served. GEA/Liberty received actual notice of the defaults, this notice was recorded in writing, and GEA/Liberty had time to cure those defaults before the Poulins filed suit. Consequently, there is no basis for reversing the jury's decision that the Poulins did not breach the agreements.

2. *The trial court properly resolved GEA/Liberty's equitable claims.*

GEA/Liberty's cross-complaint contained both legal and equitable claims. GEA/Liberty alleged that Progressive and the Poulins breached the management agreement by filing suit without providing GEA/Liberty with 15 days' prior written notice and the opportunity to correct the alleged defaults. Based on this alleged breach, GEA/Liberty sought damages, specific performance, relief from forfeiture, and an accounting. Additionally, GEA/Liberty sought a declaration that it did not breach the management agreement, that the alleged breaches do not justify termination of the agreement, that the Poulins may not terminate the agreement without providing the 15-day written notice, and that the management agreement is not terminated.

The legal claims for damages were tried first. As noted above, the jury determined that the Poulins had not breached the management agreement. The jury further found that GEA/Liberty had materially breached the management agreement and that this breach justified the agreement's termination.

Thereafter, the trial court ruled on GEA/Liberty's equitable claims for specific performance, relief from forfeiture, an accounting and declaratory relief. The court concluded that it was bound by the jury's determination that GEA/Liberty breached the management agreement and that there was no breach by Progressive or the Poulins. Based on these findings, the trial court denied declaratory relief in GEA/Liberty's favor. Thereafter, the court denied GEA/Liberty's remaining equitable claims.

GEA/Liberty contends that the trial court erred because it did not independently consider each of the equitable claims. According to GEA/Liberty, the trial court was required to rule on the issues of specific performance, declaratory relief, relief from forfeiture, and accounting without deference to the jury's decision.

GEA/Liberty is correct that an equitable action is one for the trial court alone. Although the court may permit a jury trial, the jury's verdict in equity is merely advisory and does not bind the court. (*Cutter Laboratories v. R.W. Ogle & Co.* (1957) 151

Cal.App.2d 410, 418.) In contrast, a party has a constitutional right to a jury trial in actions at law. (*American Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864, 871.)

Nevertheless, where there are legal and equitable remedies sought in the same action, resolution of one may render the other moot. (*Walton v. Walton* (1995) 31 Cal.App.4th 277, 293.) A plaintiff may plead inconsistent, mutually exclusive remedies, such as breach of contract and specific performance. However, there need not be a trial on both. (*Ibid.*) Thus, for example, if in a case involving both legal and equitable issues the trial court proceeds to the equitable issues first and its determination also disposes of the legal issues, nothing further remains to be tried by a jury. (*American Motorists Ins. Co. v. Superior Court, supra*, 68 Cal.App.4th at pp. 871-872.) Alternatively, a jury's determination on questions of fact in the initial legal proceeding may obviate the need for further proceedings in equity. (Cf. *Hughes v. Dunlap* (1891) 91 Cal. 385, 388.)

Here, in the legal proceeding the jury found that GEA/Liberty had breached the management agreement and that there was no breach on the part of the Poulins. For GEA to prevail on its equitable claims, the opposite conclusions would have to be reached. The trial court could not logically make such inconsistent findings. Thus, the jury's resolution of the legal issues rendered the equitable claims moot. Under these circumstances, the trial court properly concluded that it was bound by the jury's determination.

3. *The record supports the jury's finding of a material breach.*

GEA/Liberty contends the record does not support the jury's finding that GEA/Liberty materially breached the management agreement. Thus, the issue on appeal is whether, based on the entire record, there is substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, contradicted or uncontradicted, that supports this determination. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.)

Although every instance of noncompliance with a contract's term constitutes a breach, not every breach justifies treating the contract as terminated. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051.) California courts allow termination only if the breach can be classified as “material,” “substantial,” or “total.” (*Ibid.*) Whether a breach is so material as to constitute cause for termination is ordinarily a question for the trier of fact. (*Id.* at pp. 1051-1052.)

The management agreement provides that the Poulins can terminate it for “just cause.” Just cause includes, but is not limited to, malfeasance, material financial misrepresentations, material operational misrepresentations, the failure to timely pay Progressive's bills, and any material breach of the terms and conditions contained in the agreement. Material operational misrepresentations include the failure to disclose material matter affecting the operations of Liberty.

As discussed above, the purpose behind the structure of the management agreement was the protection of Progressive. The Poulins wanted to be sure that if control over Progressive were to be returned to them, they would receive a viable company. Thus, the materiality of the contract breaches must be analyzed in this context. (Cf. *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, *supra*, 195 Cal.App.3d at p. 1051.)

The record supports finding breaches of several of the terms and conditions contained in the management agreement. The financial statements reflected that GEA/Liberty permitted Progressive's aggregate debt to exceed \$150,000. Further, annual shareholder meetings were never held as required and, consequently, budgets were not adopted. Also, the required monthly accounting information for December 1998 and early 1999 was not timely provided to the Poulins. There is also evidence supporting the conclusion that GEA/Liberty neither actively marketed the ambulance subscription service nor complied with the prohibition against accepting assignment for Medicare claims without the Poulins' approval.

Moreover, the record supports a finding of “just cause” based on particular acts that were specifically identified as permitting termination under the management agreement. First, there was evidence that GEA/Liberty was not timely paying Progressive’s debts and obligations. Additionally, the jury could have reasonably construed GEA/Liberty’s failure to timely inform the Poulins of the sale of Golden Empire’s primary assets to Hall Ambulance as breaching the management agreement. Although the agreement did not specifically prohibit such a sale, evidence was presented that this sale caused Golden Empire to lose key personnel. Since GEA/Liberty had no employees of its own, Golden Empire employees met Liberty’s management needs. In fact, one of the promises made by Penrose in negotiating this business arrangement was that there were persons in place at Golden Empire who could fulfill these needs. Consequently, due to the loss of these employees, this sale could be categorized as an action that adversely affected Liberty’s operations.

GEA/Liberty asserts that the above breaches did not occur. In support of its claim, GEA/Liberty sets forth contradictory and explanatory evidence. However, under the applicable standard of review, GEA/Liberty’s argument fails. Reviewing the whole record in the light most favorable to the judgment below, including the reasonable inferences flowing therefrom, it must be concluded that substantial evidence supports the jury’s findings.

Moreover, the record supports the jury’s determination that these breaches were material. The materiality of a breach is a question of the degree to which the contract is frustrated within the context of its purpose. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, *supra*, 195 Cal.App.3d at p. 1051.) Here, from the Poulins’ perspective, the primary purpose of the management agreement was to protect the financial health of their company. Thus, when GEA/Liberty permitted Progressive’s aggregate debt to exceed \$150,000 and failed to timely pay Progressive’s debts, this purpose was compromised. Further, by neglecting to comply with certain of the agreement’s financial reporting

requirements, GEA/Liberty kept the Poulins from monitoring Progressive's financial status. Consequently, there is no basis for reversing the jury's finding that GEA/Liberty materially breached the management agreement.

4. *No basis exists for reversing the jury's findings that GEA/Liberty and Penrose breached their fiduciary duties.*

The jury concluded that GEA/Liberty and Penrose breached their fiduciary duties owed to Progressive and the Poulins. Nevertheless, the jury awarded only unspecified "nominal" damages.

GEA/Liberty first argues that, because its obligations and duties were controlled by the management and option agreements, and because it did not materially breach those agreements, it could not have breached its fiduciary duties. However, GEA/Liberty's position is based on a false premise. As discussed above, the evidence supports the jury's finding that GEA/Liberty materially breached the agreements. Consequently, GEA/Liberty has not provided a basis for reversing this finding.

Penrose argues that he cannot be found to have breached his fiduciary duties because the transactions he entered into as an officer and a director of both GEA/Liberty and Progressive were either contemplated or allowed by the agreements. He further contends that none of the transactions could be unfair to Progressive because GEA/Liberty was entitled to collect and retain all of the money generated by Progressive's business.

As a corporate officer with management authority, Penrose owed a fiduciary duty to Progressive as a matter of law. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420-421.) As such, Penrose owed Progressive his undivided loyalty. (*Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal.App.2d 791, 800.) Moreover, Penrose's role demanded that he scrupulously observe his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation,

or deprive it of profit or advantage. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at p. 417.)

In his roles as the president of GEA/Liberty, of Golden Empire and of Progressive, Penrose owed each corporation a duty of undivided loyalty. Thus, Penrose had an inherent conflict of interest with respect to the transactions between these corporations. The fact that the parties expected Progressive to enter into various transactions with Golden Empire and GEA/Liberty did not eliminate Penrose's conflict of interest or diminish his respective duties of loyalty. Further, there was no evidence that the Poulins authorized, approved or ratified the individual transactions at issue. Consequently, contrary to Penrose's position, Penrose could breach his fiduciary duty to Progressive when, on behalf of Progressive, he entered into various transactions with GEA/Liberty and Golden Empire.

Penrose further argues that, because GEA/Liberty was entitled to collect and keep all of Progressive's income under the management agreement, the transactions negotiated by Penrose could not be unfair to Progressive. In other words, it did not matter whether one corporation benefited at the expense of the other because their incomes were combined.

The flaw in this analysis is that it assumes that Progressive would never be returned to the Poulins' control. Obviously, that assumption is incorrect. In negotiating the agreements it was critically important to Sandy Poulin that his company be properly managed and that he be protected in the event of GEA/Liberty's default. The agreements contained numerous provisions designed to ensure that if Progressive were returned, the Poulins would receive a viable business entity. As the president of Progressive, Penrose was obligated to faithfully promote the best interests of that individual corporation and to protect it from harm.

Moreover, the record contains evidence that supports the breach of fiduciary duty findings. For example, although the sale of Golden Empire to Hall Ambulance was

potentially detrimental to Progressive, Penrose did not disclose this transaction to the Poulins until it took place. Further, after the sale to Hall Ambulance, Penrose instructed Tony Mejia, a Golden Empire employee, to disclose information to Hall regarding Progressive's Lifeline Special Event Services business. This information consisted of the events Lifeline worked, Lifeline's contacts, and the prices charged. Hall Ambulance was in competition with Lifeline for this business. Such a dissemination of business information to a competitor unquestionably supports a finding that Penrose breached his duty of undivided loyalty to Progressive.

In sum, GEA/Liberty and Penrose have not presented any viable grounds for reversing the jury's findings that they breached their fiduciary duties. Further, the evidence supports those findings.

5. *The record supports the jury's denial of Golden Empire's claims for money due.*

Golden Empire asserted claims against Progressive for money due on the \$150,000 line of credit, for rent due on ambulances leased to Progressive, and for payment of supplies provided by Golden Empire. The jury found Progressive was not liable for these claimed amounts. Golden Empire contends that the undisputed evidence mandates the opposite conclusion.

As the party asserting this claim for damages, Golden Empire had the burden of proof as to each essential fact. (Evid. Code, § 500.) Thus, Golden Empire was required to convince the jury that its factual version was more likely than not the true version. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.)

Golden Empire relies on Robert Mosesian's testimony to support its position. However, as outlined below, this evidence does not provide adequate proof of any of the amounts claimed.

With respect to the \$150,000 line of credit, Robert Mosesian testified that it was carried on Progressive's books as a loan payable. However, no evidence was presented as to what amounts Progressive drew on this line or credit or what, if any, balance was due from Progressive to Golden Empire as of the time of trial. Thus, the jury could reasonably deny this claim on the ground that Golden Empire did not meet its burden of proof.

Robert Mosesian testified that he prepared an invoice that was sent to Progressive showing a balance due of approximately \$159,000 for rent accrued on certain ambulances between August 1999 and the time of trial. Rent was claimed for eight vehicles. However, no documentation exists regarding these alleged rentals. According to Mosesian, Penrose would calculate an amount but no document would be prepared and submitted to Progressive specifying the vehicle and the monthly rental amount. Further, it was unclear who actually owned the subject vehicles. Robert Mosesian testified he recalled that Golden Empire owned three of these ambulances outright but did not document this claim. Mosesian believed the other vehicles were leased but was not sure which leasing company was involved. Moreover, Progressive had assumed certain Golden Empire leases and thus made the payments directly to the third party owners. Thus, the only proof of Golden Empire's ambulance rental claim was Robert Mosesian's undocumented statement that the amount was due.

Similarly, no concrete proof was presented regarding the payment allegedly due for supplies. Robert Mosesian admitted that there was no documentation to back up these claims.

In sum, the record supports the jury's denial of Golden Empire's claims for money due. Golden Empire relied solely on undocumented testimony to prove its claims and, consequently, did not meet its burden of proof.

6. *GEA Holding and Golden Empire were properly named in the injunction.*

The trial court issued a permanent injunction prohibiting GEA/Liberty, GEA Holding and Golden Empire from taking any action or engaging in any conduct that would interfere with Progressive's operations. These prohibitions included leasing or borrowing money on behalf of Progressive, canceling any insurance policies in Progressive's name, denying the Poulins access to all records regarding the operation of Progressive under the management agreement, and competing with Progressive in the Liberty service area. Further, these entities were required to notify the Poulins of any litigation against them, and to turn over all documents and information necessary for the transfer of Progressive to the Poulins.

Golden Empire and GEA Holding contend that they should not have been included in this injunction because they were not significant parties to the management and option agreements. According to Golden Empire and GEA Holding, there is no evidence that they pose a threat to Progressive.

However, GEA Holding and Golden Empire unjustifiably disparage their abilities. Golden Empire and GEA Holding played important roles in the overall option and management arrangement. As acknowledged in the management agreement, GEA Holding wholly owns Golden Empire and Golden Empire wholly owns GEA/Liberty. Thus, GEA Holding has control over Golden Empire and through Golden Empire, also has control over GEA/Liberty. Further, under the management agreement, GEA Holding specifically agreed to indemnify Progressive and to not compete with Progressive, Liberty, or the Poulins.

Golden Empire's involvement with Progressive was also substantial. Golden Empire provided Progressive with financing, vehicles and skilled management employees. Also, as its owner, Golden Empire has control over GEA/Liberty.

Thus, considering the ownership structure and the common officers and directors of the three entities, along with the involvement of GEA Holding and Golden Empire in

the management of Progressive, it was appropriate for the trial court to include GEA Holding and Golden Empire as parties to the injunction. Based on their positions and knowledge, either corporation has the potential to undermine the injunctive relief granted to Progressive and the Poulins.

THE CROSS-APPEAL

7. The record supports the jury's finding that Robert Mosesian did not breach his fiduciary duty.

Progressive and the Poulins contend that the jury improperly failed to find that Robert Mosesian had breached his fiduciary duties to Progressive. As noted above, Robert Mosesian was the chief financial officer and a director of GEA/Liberty, Golden Empire and Progressive. In these roles, Mosesian helped structure various transactions between these corporations including the vehicle leases and the line-of-credit agreement.

According to Progressive and the Poulins, Robert Mosesian breached his fiduciary duty to Progressive when he acted on behalf of more than one corporation, failed to document certain transactions in writing, and paid management fees owed by Progressive to another affiliated company before paying other outstanding bills. Progressive and the Poulins also claim such a breach occurred when Mosesian failed to disclose his knowledge of the Golden Empire/Hall Ambulance transaction.

As the chief financial officer and a director, Robert Mosesian owed a fiduciary duty to Progressive. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at pp. 420-421.) Thus, Mosesian was required to affirmatively protect the interests of Progressive and to refrain from doing anything that would work injury to Progressive or deprive it of profit or advantage. (*Id.* at p. 417.)

However, the fact that Mosesian was acting on behalf of both corporations when the subject transactions were undertaken does not in and of itself indicate he breached his fiduciary duty to either corporation. Rather, a transaction between corporations with common directors is not void or voidable because of the interlocking directorates so long

as the transaction is just and reasonable. (Corp. Code, § 310, subd. (b); *Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405, 420.)

Here, there is no evidence that the transactions complained of were unfair to Progressive or caused it injury. Further, unlike John Penrose, Robert Mosesian did not learn of the Hall sale until shortly before the Poulins were informed of it. Thus, there is no basis for overturning the jury's judgment and finding that Robert Mosesian breached his fiduciary duty as a matter of law.

8. *The trial court correctly refused to amend the judgment to add claims against Peter Mosesian and other Mosesian entities under an alter ego liability theory.*

The trial court refused to amend the judgment to include a finding that Peter Mosesian, the Mosesian Family Trust, the Mosesian Family Corporation, GEA Holding, and Golden Empire are the alter egos of GEA/Liberty. The court concluded there was no evidence of bad faith and no showing of injustice or inequity. Progressive and the Poulins contend this ruling was error.

A corporation is ordinarily regarded as a legal entity separate and distinct from its stockholders, officers and directors. (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892.) However, when a corporation is used by an individual or by another corporation to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity. (*Ibid.*)

There are two general requirements for applying this alter ego doctrine. First, there must be such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist. (*Robbins v. Blecher, supra*, 52 Cal.App.4th at p. 892.) Second, it must be demonstrated that the failure to disregard the corporate entity would sanction a fraud or promote injustice. (*Ibid.*) ““When considering the application of the alter ego doctrine to a particular situation, it must be remembered that it is an equitable doctrine and, though courts have justified its application through consideration of many factors, their basic

motivation is to assure a just and equitable result.”” (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777.) Accordingly, a trial court is not justified in disregarding the corporate entity absent a finding of some form of bad faith. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838.)

Here, Progressive and the Poulins discuss the evidence supporting their claim of unity of interest and ownership between Peter Mosesian and his various companies at length. However, they present no argument or evidence regarding the inequity prong of the alter ego doctrine. Before a corporate existence will be disregarded, both requirements must be found to exist. Thus, Progressive and the Poulins have not presented any grounds for disturbing the trial court’s conclusion that alter ego liability is not justified in this case. Progressive and the Poulins did not meet their burden of demonstrating that the failure to impose alter ego liability would produce an inequity.

DISPOSITION

The judgment is affirmed. The parties to bear their own costs on appeal.

Levy, J.

WE CONCUR:

Vartabedian, Acting P.J.

Harris, J.